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No. 07-543

IN THE

Supreme Court of the United States

AT&T CORPORATION,

Petitioner,

v.

NOREEN HULTEEN; ELEANORA COLLET; LINDA PORTER; ELIZABETH SNYDER; COMMUNICATIONS WORKERS OF AMERICA,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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December 2, 2008

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INTRODUCTION

Prior to the Pregnancy Discrimination Act of 1978 ("PDA"), AT&T's personnel policies classified pregnancy leave as personal leave, not temporary disability leave. AT&T's Net Credited Service ("NCS") system, in turn, awarded full service credit, or seniority, for temporary disability leave, but only 30 days service credit for personal leave. As a result, women who took pregnancy leaves did not receive full service credit, and their NCS dates were adjusted accordingly. When the PDA took effect, AT&T abolished its pregnancy leave policies, but continued to rely on its lawful (and in any event unchallenged) pre-PDA NCS date adjustments when calculating pension benefits.

The Ninth Circuit's conclusion that this reliance violates Title VII is plainly wrong. First, that ruling necessarily gave the PDA retroactive effect. Second, even if AT&T's earlier service credit awards had been unlawful, the limitations period for challenging them expired decades ago, and this Court has repeatedly held that Title VII is not violated anew when an employer gives present effect to stale acts of discrimination. Finally, § 703(h) of Title VII codifies this principle where, as here, past acts of discrimination are given present effect through an otherwise lawful seniority system.

Respondents make two central arguments in response. They repeatedly claim that the NCS system is "facially discriminatory." Relatedly, they claim that AT&T's pre-PDA denial of full service credit for pregnancy leaves was not immediately actionable, and could be challenged only when it caused the concrete harm of reduced pension awards

decades later. As AT&T explains, both assertions are wrong.

I. THE NCS SYSTEM IS NOT FACIALLY DISCRIMINATORY.

As AT&T demonstrated, its NCS system is facially neutral, as it awards seniority to men and women on an identical basis. Respondents have failed to show otherwise.

A. AT&T's Pre-PDA Leave Policies Were Not Seniority Accrual Rules.

Respondents baldly assert that AT&T's pre-PDA pregnancy leave policies were NCS seniority accrual rules and those leave policies rendered that system facially discriminatory. Br. 17-18. This is incorrect. The NCS accrual rule tied service credit to whether leave was classified as paid disability or personal. See JA 47 n.2. ("employees on paid disability leave received full service credit for the period of their disability absence; employees on personal leaves of absence . . . received a maximum of thirty days service credit.").[1] But it was AT&T's personnel policies that determined how leaves, including pregnancy leave, were classified. *Id.* ("the *disability policies* of AT&T"—not the NCS system—"did not treat pregnancy as a disability") (emphasis added); see also *Pallas v. Pacific Bell*, 940 F.2d 1324, 1326 (9th Cir. 1991) (Pacific Bell "required employees disabled by pregnancy to take personal leaves"). The

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[1] *See also* Pet. App. 4a (employees "on personal leave received a maximum of thirty days NCS credit, whereas there was no limit on the amount of NCS credit for employees on temporary disability leave"); *Pallas* v. *Pacific Bell*, 940 F.2d 1324, 1326 (9th Cir. 1991) (under the NCS system, "an employee receives credit for . . . absen[ce] due to a temporary disability, but does not receive [full] credit for time spent on personal leave").

Maternity Payment Plan that operated between August 7, 1977 and the PDA's effective date confirms this. AT&T did not change the NCS accrual rules to accord women greater service credit for pregnancy leaves during this period; it changed the classification of the leave, providing that pregnant women "were eligible for disability benefits for up to six weeks of leave." JA 48.[2]

AT&T's leave policies indisputably operated outside the NCS system. They established when employees could miss work for an extended period without ceasing their employment, and which extended absences would be paid or unpaid. That they had "some nexus" to AT&T's seniority system did not make them accrual rules. *California Brewers Ass'n* v. *Bryant*, 444 U.S. 598, 608 (1980).

Indeed, the discriminatory no-marriage rule at issue in *United Air Lines* v. *Evans*, 431 U.S. 553 (1977), had the same nexus to United's seniority system that AT&T's pre-PDA leave policy had to the NCS system. The no-marriage rule was a personnel policy that had an inescapable effect on seniority: it forced female employees to resign if they married, which in turn caused a forfeiture of accrued seniority under United's neutral seniority rules. But this nexus did not make the no-marriage rule part of United's seniority system; if it had, the Court could not have deemed that seniority system non-

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[2] AT&T never conceded, Resp. Br. 17-18, that the pre-PDA leave policies were NCS accrual rules. *See* Ptr. Br. 5 (AT&T's classification of pregnancy leaves "as personal leaves, not as disability leaves" was "significant because NCS adjustments were handled differently for these categories of leave"); *id.* at 31 ("the NCS system recognized 30 days service credit for *all* personal leave," whether or not pregnancy-related) (emphasis added).

discriminatory. *Id.* at 557-58. So too here, AT&T's pre-PDA personnel policies treated pregnancy as unpaid personal leave, and this classification affected service credit under the NCS system's distinct accrual rules. But this did not render those policies part of the NCS system.

Thus, the NCS system is facially neutral in the same way United's seniority system was. United's system deprived both men and women of accrued seniority if they resigned, regardless of the reason for the resignation and whether it was compelled by a discriminatory policy. The NCS system denies full service credit to both men and women who take personal leave, regardless of the reason for the leave and whether it was compelled by a policy that drew pregnancy-based distinctions.

In short, because AT&T's pre-PDA policies were not part of the NCS system, they could not have rendered the NCS system "facially discriminatory."

B. AT&T's Pre-PDA Leave Policies Were Lawful.

AT&T's pre-PDA pregnancy leave policies were not only independent of the NCS system, they were lawful. Respondents claim, Br. 44-47, that the pre-PDA leave policies *might* have violated Title VII under a disparate impact theory that they never asserted. This claim is mistaken.

In *General Electric Co.* v. *Gilbert*, 429 U.S. 125 (1976), the United States challenged the exclusion of pregnancy from a benefits package on a disparate impact theory. It explained that the exclusion subjected women "to a substantial risk of total loss of income because of temporary medical disability," and argued that, even if the policy was "regarded as a sexually 'neutral' policy," this adverse effect made out

a *prima facie* violation. Br. of United States 12, 16-17, *Gilbert*, 429 U.S. 125. This Court rejected that theory. It deemed the adverse impact from "not receiv[ing] benefits" *legally insufficient to establish a disparate impact*, and instead required evidence that the total benefits package was "worth more to men than to women." *Gilbert*, 429 U.S. at 138.

By contrast, in *Nashville Gas Co.* v. *Satty*, 434 U.S. 136 (1977), the Court held that a policy "of *denying accumulated [i.e., previously earned] seniority* to female employees returning from pregnancy leave violates . . . Title VII" under a disparate impact theory. *Id.* at 139 (emphasis added). Stressing that "[t]he distinction between benefits and burdens is more than one of semantics," the Court concluded that the policy in *Satty* imposed a "substantial burden" on women and thus was unlawful on disparate impact grounds. *Id.* at 141-42.

Being awarded seniority during an extended absence from work is a benefit just like receiving wages, disability pay or insurance coverage during such an absence is a benefit. Thus, a denial of the *benefit* of full service credit did not cause the type of *burden Satty* deemed actionable. Indeed, *Satty* itself made this clear: the policy in that case also did not award seniority for time on pregnancy leave, but the Court did not mention that aspect of the policy when explaining why plaintiffs had established a disparate impact. See *id.* at 141 ("petitioner's policy of *depriving employees* returning from pregnancy leave *of their accumulated seniority* acts both to deprive them 'of employment opportunities' and to 'adversely affect [their] status as [employees]'"). This same distinction explains why the Court did not "h[o]ld" a petition for a writ of certiorari involving a challenge to AT&T's pre-PDA leave policy pending its review of

the *Satty* decision, and instead vacated a decision permitting a Title VII challenge to that policy in light of *Gilbert*. Ptr. Br. 23 n.7. It also explains why the EEOC itself has conceded that, before the PDA, "'the denial of service credit to women on maternity leave was not unlawful,'" JA 146, and why several circuit courts reached the same conclusion in light of *Gilbert* and *Satty*. See Ptr. Br. 17 (citing cases).

Because AT&T's pre-PDA leave policies were lawful when used, they could not have rendered the *post-PDA* NCS system "facially discriminatory."

C. AT&T's Pre-PDA Leave Policies Were Facially Neutral As A Matter Of Law, And Became Inoperative When The PDA Took Effect.

Even if AT&T's pre-PDA leave policies were NCS system rules and could have been deemed illegal, respondents' facial discrimination claim still fails. First, even under respondents' reading of *Gilbert* and *Satty*, AT&T's pre-PDA leave policies could only have been unlawful under a disparate impact claim. The very premise of such a claim is that a policy is "*neutral on [its] face* but ha[s] a discriminatory effect." *Satty*, 434 U.S. at 141 (emphasis added). Thus, pre-PDA policies that, as a matter of law, were *facially neutral* when used could not render the post-PDA NCS system *facially discriminatory*. Second, the policies were abolished on the PDA's effective date. Thus, the post-PDA NCS system was not facially discriminatory.

1. AT&T's pre-PDA leave policies were facially neutral as a matter of law.

Prior to the PDA, *Gilbert* expressly held that a pregnancy-based distinction was "not a gender-based

discrimination at all." 429 U.S. at 136.[3] Thus, even if subject to challenge on disparate impact grounds, facially neutral pre-PDA policies could not render the post-PDA NCS system facially discriminatory. Recognizing this, respondents try to show that, notwithstanding *Gilbert*, AT&T's pre-PDA leave policies were facially discriminatory before the PDA. They argue that (1) *Gilbert* is limited to its precise facts, and (2) after the PDA, this Court held that pregnancy-based distinctions constituted facial gender discrimination under Title VII's original text. Br. 47-48 (citing *Newport News Shipbuilding & Dry Dock Co.* v. *EEOC*, 462 U.S. 669 (1983)). This attempt to spin pre-PDA straw into pre-PDA gold is baseless.

First, respondents ignore *Satty*, which held that a policy denying seniority accruals for pregnancy leaves was "not on its face a discriminatory policy." 434 U.S. 140. Thus, it is not necessary to "extend the rationale of *Gilbert* beyond its holding," Resp. Br. 47, to conclude that AT&T's pre-PDA leave policies were facially neutral. *Satty* incontestably establishes that fact.

Second, *Newport News* did not rest its finding of facial discrimination solely on the pre-PDA text of Title VII. *Id.* The question presented there was whether an insurance plan "complie[d] with the *amended* statute." 462 U.S. at 671 (emphasis added). The Court considered "whether Congress, *by enacting the [PDA]*, . . . rejected the test of discrimination employed by the Court in" *Gilbert, id.* at 676

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[3] By repeatedly quoting this holding and arguing that its pre-PDA leave policies were *lawful*, Ptr. Br. 16-17, 22-23, AT&T plainly disputed that its policies were facially discriminatory. Respondents' contrary claim, Br. 18, is inexplicable.

(emphasis added), then reviewed "the *terms of the amended statute* to decide whether petitioner has unlawfully discriminated," *id.* at 682 (emphasis added). The Court held that "*[t]he 1978 Act makes clear* that it is discriminatory to treat pregnancy-related conditions less favorably than other medical conditions." *Id.* at 684 (emphasis added).

Thus, *Satty* establishes that pre-PDA policies affecting seniority accruals during pregnancy leave were facially neutral; and *Newport News* casts no doubt on that conclusion, because it relied on the *amended* text of Title VII. Use of facially neutral leave policies prior to April 1979 could not have rendered the NCS system facially discriminatory in the 1990s.

2. AT&T's pre-PDA leave policies were abolished before the PDA took effect.

Respondents' claim of facial discrimination also fails because AT&T abolished its pre-PDA leave policies before the PDA took effect. Since then, the NCS system has simply given effect to NCS dates that were adjusted when the pre-PDA leave policies were used. *Evans* and its progeny make clear that this is not a new Title VII violation.

To show otherwise, respondents try to equate this case with *Bazemore*. There, a state employer had used a pay structure prior to 1965 in which salaries for black workers were "intentionally and quite openly simply set lower than those of white colleagues in the same employment positions." *Bazemore* v. *Friday*, 751 F.2d 662, 690 (4th Cir. 1984) (Phillips, J., concurring in part, dissenting in part).[4]

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[4] This Court has recognized that Judge Phillips' opinion set forth the controlling description of the *Bazemore* facts in

In 1965, the state began paying all new hires the same salaries, regardless of race, *id.*, and applied a pay-setting rule whereby each worker's salary was based on his or her prior year's salary, plus a race-neutral raise. Resp. Br. 19. Respondents claim that this Court deemed the new pay structure unlawful "because it *relied on* the pre-Act discriminatory base salaries." *Id.* (emphasis added). Respondents argue that the NCS system is discriminatory in the same way, "because it relies upon a facially discriminatory measure of service." *Id.* at 20.

These misleading descriptions cannot obscure the fundamental differences between this case and *Bazemore*. The state did not abolish its discriminatory pay structure for pre-1965 hires, then simply give present effect to completed acts of past discrimination. Rather, it *continued to use an openly discriminatory pay scale*. While respondents focus on the neutral raises, the state was still using openly discriminatory base salaries for pre-1965 hires after Title VII had outlawed discrimination in pay. *Bazemore*, 751 F.2d at 694 ("pre-1965 *overt discrimination in salary continued*" after Title VII was extended to states) (emphasis added); *Ledbetter* v. *Goodyear Tire & Rubber Co.*, 127 S.Ct. 2162, 2174 n.6 (2007) (the state's conduct was the "'*continued use of a racially explicit base wage*'") (emphasis added) (quoting Petitioner's Br. 33, *Bazemore*, 478 U.S. 385); *id.* at 2173 (pay structure in *Bazemore* was "'*a mere continuation of the pre-1965 discriminatory pay structure*'").

This is why this Court deemed the violation of Title VII "obvious." *Bazemore* v. *Friday*, 478 U.S. 385, 395

Ledbetter v. *Goodyear Tire & Rubber Co.*, 127 S.Ct. 2162, 2173 n.5 (2007).

(1986) (Brennan, J., concurring, joined by all other Justices).

> A pattern or practice [*i.e.*, paying blacks less than whites for the same work] that would have constituted a violation of Title VII, but for the fact that the statute had not become effective, became a violation upon Title VII's effective date, and to the extent that an employer *continued to engage in that act or practice*, it is liable under that statute.

Id. (emphasis added). See also *Ledbetter*, 127 S.Ct. at 2173 (discussing *Bazemore* and observing that "an employer [that] adopts a facially discriminatory pay structure" and then "intentionally *retains* such a pay structure can surely be regarded as intending to discriminate on the basis of race as long as the structure *is used*") (emphases added). The wrongful "perpetuat[ion]" of discrimination in *Bazemore*, 478 U.S. at 395, therefore, did not rest on current effects of past acts of discrimination. Indeed, the Court stressed that its "holding in no sense gives legal effect to the pre-1972 actions, but, consistent with *Evans* . . . focuses on the *present* salary structure, which is illegal if it is a mere *continuation* of the pre-1965 discriminatory pay structure." *Id.* at 396 n.6 (emphases added).

AT&T, by contrast, did not continue to use its pre-PDA leave policies after the PDA outlawed them. After the PDA's effective date, AT&T treated pregnancy the same as other temporary disabilities and awarded full service credit for pregnancy leaves. And respondents nowhere challenge AT&T's showing that it does not currently use its pre-PDA leave policies to calculate benefits for women who took pre-PDA pregnancy leaves, as the lower court mistakenly and improperly claimed. Ptr. Br. 26-29.

Nevertheless, respondents equate AT&T's abolition of its pre-PDA leave policies with the state's act in *Bazemore* of "abandon[ing] . . . its pre-Act policy of giving blacks lower starting wages and pay raises," an act that was "not sufficient to render its pay structure nondiscriminatory." Br. 24. But the state's action vis-à-vis new hires was insufficient in *Bazemore* because the state continued, after it became subject to Title VII, to pay pre-1965 hires openly discriminatory salaries. Here, AT&T did not abolish the pre-PDA leave policies just for women hired after the PDA took effect, but for all women.[5]

Nor does the post-PDA NCS system rely "upon a facially discriminatory measure of service." Resp. Br. 20. The measure of service in the NCS system is term of employment ("TOE"). JA 38-39. Respondents nowhere dispute that TOEs are facially neutral: they are calculated based on the difference between a facially neutral NCS date and a facially neutral date of retirement.

Thus, what respondents describe as "a facially discriminatory measure of service" is in fact a facially neutral TOE that respondents believe is infected with discrimination, because it was calculated using an NCS date adjusted as a result of AT&T's pre-PDA leave policies. This is simply a claim that the NCS system gives present effect to pre-PDA actions. Respondents argue that the NCS system "discriminate[s]" by "setting pensions using a measure of service that gives those women [who took pre-PDA pregnancy leaves] less credit for the same time served

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[5] Accordingly, respondents' example of a company that barred women from its gym starting in 1960 and either left that policy in place after Title VII took effect, or changed it to bar only women hired before 1964, Br. 26, is inapposite.

simply because they took pregnancy leave rather than other forms of temporary disability leave." Br. 22. But again, this is just a different way of saying that AT&T "discriminates" by allowing "precharging period discrimination [to] adversely affect[] the calculation of a neutral factor ([*i.e.*,] seniority) that is used in determining [pension benefits]." *Ledbetter*, 127 S.Ct. at 2174. And that claim is both meritless and time-barred.

Indeed, the claim this Court rejected in *Evans* could have been stated in the same terms respondents use. Some employees "with less total service than [Evans] ha[d] more seniority than she" because she had resigned under an illegally discriminatory policy. *Evans*, 431 U.S. at 557. Thus, like respondents here, Evans could have argued that United was discriminating against her by "using a measure of service that gives . . . women less credit for the same [or even more] time served simply because they" were forced to resign due to marriage. Br. 22. This verbal formulation, however, does not change the underlying reality: Evans, like respondents here, alleged that a "seniority system g[ave] present effect to [a] past illegal act and therefore perpetuate[d] the consequences of forbidden discrimination." *Evans*, 431 U.S. at 557. That claim failed in *Evans*, and must fail here as well.[6]

At bottom, "all [respondents] ha[ve] alleged is that [AT&T] discriminated against [them] . . . in the past

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[6] *Evans* cannot be distinguished on the ground that United's marriage rule operated "entirely outside" a neutral seniority system, Resp. Br. 21. As AT&T has shown, *supra*, § I.A., United's no-marriage rule had the same relationship to its seniority system that AT&T's pre-PDA leave policies had to the NCS system, and both seniority systems are facially neutral in the same ways.

and that this discrimination reduced the amount of later [pension benefits]." *Ledbetter*, 127 S.Ct. at 2174. Since *Evans*, this Court has recognized in an unbroken string of cases—including *Bazemore*—that such an allegation does not establish a current violation of Title VII.

D. Section 706(e)(2) Is Irrelevant.

Respondents' extensive reliance on § 706(e)(2) is misplaced. Under that provision, a facially neutral seniority system adopted for an intentionally discriminatory purpose can be challenged, *inter alia*, when an employee is injured by application of that system. See 42 U.S.C. § 2000e-5(e)(2). Respondents concede, however, that they are not making such a claim, but instead rest their case entirely on the assertion that the NCS system is facially discriminatory. Br. 18 n.5, 29. Section 706(e)(2) also provides that a facially discriminatory seniority system be challenged when it is applied, but the NCS system was and is facially neutral. *Supra*, § IA.-C.

II. AT&T'S SERVICE CREDIT DENIALS WERE ACTIONABLE EMPLOYMENT PRACTICES.

Respondents also try to escape the dispositive import of *Evans* and its progeny by arguing that AT&T's pre-PDA service credit denials could not have been challenged when made. They cannot dispute that seniority or service credit is a term, condition, or privilege of employment, and that denials of service credit are therefore employment practices within the meaning of the statute, Ptr. Br. 38-40. Instead, respondents erroneously claim their service credit denials had only an "abstract and conjectural" potential to affect their employment rights, and thus were not immediately actionable. Br. 31, 34. In fact, denial of seniority results in actionable "concrete

harm." See *Lorance* v. *AT&T Techs.*, 490 U.S. 900, 907-08 (1989).

A key factor in AT&T's pre-PDA benefit formula was an employee's term of employment, measured in years, months and days. Accordingly, as the parties' stipulation confirms, AT&T's denial of "the relatively small amounts of time at issue here," Resp. Br. 34, predictably resulted in lower pension benefits for respondents. See JA 42, 44, 47 (had each respondent received the denied service credit, her benefits would have been "correspondingly greater.").

In all events, an alleged unlawful denial of service credit is a completed employment practice subject to challenge. Seniority is a contract right generally linked to significant and substantial employment consequences. The deprivation of a contract right of this nature is therefore an "alleged unlawful employment practice" that starts the statute of limitation running on any Title VII claim. 42 U.S.C. § 2000e-5(e)(1). See U.S. Br. 23.

This Court's cases confirm this commonsense conclusion. In *Delaware State College* v. *Ricks*, 449 U.S. 250 (1980), a discriminatory denial of tenure commenced the running of the limitations period. The subsequent discharge was simply a consequence of the earlier, allegedly discriminatory tenure denial. See *id.* at 257-58 (the "emphasis is not upon the effects of earlier employment decisions").

Respondents seek to distinguish *Ricks* by noting that the professor's job loss was the delayed, but "'*inevitable*'" "'consequence of the denial of tenure.'" Br. 34 n.12 (quoting *Ricks*, 449 U.S. at 257-58). But *Lorance* rejected the same "inevitability" argument. Although the benefits of seniority, "like those of an

insurance policy payable upon the occurrence of a non-inevitable event," may be "speculative,"

> it makes no more sense to say that no "concrete harm" occurs when an employer provides a patently less desirable seniority guarantee than what the law requires than it does to say that no concrete harm occurs when an insurance company delivers an accident insurance policy with a face value of $10,000 when what has been paid for is a face value of $25,000. It is true that the injury to the employee becomes substantially *more* concrete when the less desirable seniority system causes his demotion, just as the injury to the policyholder becomes substantially more concrete when the accident occurs and the payment is $15,000 less than it should be. But that is irrelevant to whether there was *any* concrete injury at the outset. What the dissent means by "concrete harm" is what *Ricks* referred to as the point at which the injury become "most painful"—and that case rejected it as the point of reference for liability.

490 U.S. at 907 n.3 (citation omitted).

The courts of appeals have read *Ricks* and *Evans* to establish that a denial of seniority is an actionable employment practice. In *Alleyne* v. *American Airlines*, ___ F.3d ___, 2008 WL 4899450 (2d Cir. Nov. 17, 2008), the Second Circuit recently held that an employment discrimination claim arose for statute-of-limitations purposes when the employee learned of his allegedly discriminatory loss of seniority, *not* on the subsequent date of the termination of his employment. Similarly, Judge Posner explained in *Kennedy* v. *Chemical Waste Management*, 79 F.3d 49, 50 (7th Cir. 1996), that a deprivation of seniority "is an injury that sets the statute of limitations running,

even though the injury is contingent rather than actual unless and until job protection is needed" (citation omitted). See also *Huels* v. *Exxon Coal USA*, 121 F.3d 1047, 1051 (7th Cir. 1997) (claim accrued when plaintiff received allegedly discriminatory seniority ranking, even though it "was not a 'certain prelude' to being laid off"); *Cox* v. *City of Memphis*, 230 F.3d 199, 205 (6th Cir. 2000) (allegedly discriminatory seniority ranking is actionable notwithstanding the "possibility that one will be hired or promoted despite" that discrimination).[7]

Thus, it is irrelevant whether respondents were actually denied job bids, shift preferences or other seniority-related benefits. Br. 25.

> Many valuable job benefits are contingent. No one would doubt that taking away an employee's health insurance because of his race was a violation of Title VII of which the employee could

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[7] Service credit denials are thus not like poor performance evaluations. Resp. Br. 31-32. As the cases in text recognize, denial of seniority is much more significant because it either has certain consequences (*e.g.*, a corresponding loss of some amount of pension benefit here) or will have such consequences if certain not-improbable contingencies occur (*e.g.*, layoffs, promotions, or shift changes). Respondents' cases recognize that context is critical to determining whether a particular act is an employment practice. *See Oest* v. *Illinois Dep't of Corr.*, 240 F.3d 605, 611 (7th Cir. 2001). In addition, these cases involved poor performance evaluations that could not have any effect on terms or conditions of employment, *see Taylor* v. *Small*, 350 F.3d 1286, 1292-93 (D.C. Cir. 2003), or plaintiffs who had "not pointed to any immediate consequence[s] of the reprimands, such as ineligibility for job benefits like promotion, transfer to a favorable location, or an advantageous increase in responsibilities." *Oest*, 240 F.3d at 613. The clear implication is that a performance evaluation that could affect such opportunities would be actionable.

> complain the moment it was taken away, even though until he got sick and needed health insurance he would not have suffered a "real" injury.

Kennedy, 79 F.3d at 50. The "'proper focus [for calculating the limitations period] is upon the time of the *discriminatory acts*, not upon the time at which the *consequences* of the acts became most painful.'" *Ricks*, 449 U.S. at 258. Here, the alleged discriminatory act was AT&T's pre-PDA disparate treatment of pregnancy leave.

Finally, respondents claim that *individual denials* of service credit are *not* employment practices and that all the cases AT&T cites involve "change[s in] the terms of a *seniority system*." Br. 32-33 (emphasis added). But, the courts of appeals decisions just discussed hold that individual denials of seniority are actionable employment practices. And § 706(e)(2) casts no doubt on the validity of these holdings. Section 706(e)(2) relaxed the requirement that employees challenge the *adoption of policies* that were facially neutral but discriminatory in intent, see *Lorance*, 490 U.S. at 908-09, but necessarily recognized that workers could challenge an alleged individualized denial of seniority. In fact, the various cases respondents and their *amici* cite to show that AT&T's pre-PDA policies were unlawful before the PDA was passed simply confirm the obvious point that respondents could have and therefore should have sued to challenge the service credit denials decades ago. See *In re Southwestern Bell Tel. Co. Maternity Benefits Litig.*, 602 F.2d 845 (8th Cir. 1979); *Communications Workers of Am.* v. *AT&T Co.*, 513 F.2d 1024 (2d Cir. 1975); *deLaurier* v. *San Diego Unified Sch. Dist.*, 588 F.2d 674 (9th Cir. 1978) (mandatory maternity leave illegal).

In short, the limitations period began to run on respondents' claims decades ago, and their claims are therefore time-barred.

III. THE LOWER COURT GAVE THE PDA IMPROPER RETROACTIVE EFFECT.

In ruling that AT&T's post-enactment reliance on pre-PDA service credit denials violate Title VII, the Ninth Circuit necessarily gave the PDA improper retroactive effect. Respondents' efforts to show otherwise are baseless.

A. The Lower Court Gave The PDA Impermissible Retroactive Effect.

A law operates retroactively when it "'tak[es] away or impair[s] vested rights acquired under existing laws, or creat[es] a new obligation, impos[es] a new duty, or attach[es] a new disability, in respect to transactions or considerations already past.'" *Fernandez-Vargas* v. *Gonzales*, 548 U.S. 30, 37 (2006).[8] Respondents contend that none of these concerns is implicated here because AT&T is being held liable only for pension calculations made "decades after the PDA took effect." Br. 37. But this attempt to focus on AT&T's post-enactment benefit calculations cannot obscure the retroactive effects of the decision below.

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[8] *Fernandez-Vargas* belies respondents' claim, Br. 37, that this Court dismissed the centrality of a "vested rights" analysis in *Republic of Austria* v. *Altmann*, 541 U.S. 677 (2004). In fact, *Altmann* employed the same language as *Fernandez-Vargas*. *See* 541 U.S. at 693. The passage respondents quote, Br. 37, is from a footnote in a later part of the *Altmann* opinion that addresses "whether anything in the [*statute*] . . . suggests that we should not apply it to . . . . preenactment conduct." *See* 541 U.S. at 697 (emphasis added).

The relevant event, for retroactivity purposes, is AT&T's pre-PDA service denials. These denials are indisputably the basis for AT&T's liability in this case. But for those decisions, respondents have no case.

Respondents and the lower court attempt to shift the focus to AT&T's post-enactment "fail[ure]" to recalculate or "'undo'" respondents' adjusted NCS dates. Pet. App. 7a, 19a, 21a; Br. 39. But, absent retroactive application of the PDA, AT&T had no duty to change those dates. Because respondents failed to challenge their adjusted NCS dates within 300 days of learning of them, AT&T was "*entitled* to treat [those] past act[s] as lawful." *Evans*, 431 U.S. at 558 (emphasis added). Each unchallenged adjustment was "the legal equivalent of a discriminatory act which occurred before the statute was passed," and thus had "*no present legal consequences*." *Id.* (emphasis added). AT&T's supposed failure to "undo" *lawful* NCS dates, therefore, could only be unlawful if the PDA had retroactively changed the legal character of respondents' NCS dates.

And holding AT&T liable for this post-enactment "failure" would give the PDA retroactive effect. The lower court's interpretation of the PDA would "tak[e] away or impair[] vested rights [AT&T] acquired under existing laws," *Fernandez-Vargas*, 548 U.S. at 37—*i.e.*, AT&T's "*entitle[ment]* to treat" pre-PDA service credit calculations that were not timely challenged "as lawful." *Evans*, 431 U.S. at 558 (emphasis added).[9] Similarly, such an application of the PDA would "creat[e] a new obligation, impos[e] a

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[9] AT&T's settled expectations, therefore, derived not only from *Gilbert*, *cf.* Resp. Br. 43, but also from respondents' failure to challenge the service credit denials when they occurred.

new duty, or attach[] a new disability, in respect to transactions or considerations already past." *Fernandez-Vargas*, 548 U.S. at 37. As the lower court read it, the PDA would impose a new duty (*i.e.*, to award service credit) and attach a new disability (*i.e.*, liability for failure to award such additional service credit) to pre-PDA service credit decisions that have "no present legal consequences," *Evans*, 431 U.S. at 558.

These new disabilities and corresponding impairments of vested rights are completely different than the loss of a railroad's "right" to dam up flood waters, *Chicago & Alton R.R.* v. *Tranbarger*, 238 U.S. 67 (1915), an employer's "right" to continue to discriminate by race in compensation, *Bazemore*, 478 U.S. at 395-97, an alien's right "to continue illegal conduct indefinitely under the terms on which it began," *Fernandez-Vargas*, 548 U.S. at 47, or a school's "right" to admit students based on SAT scores, Resp. Br. 38. AT&T was not held liable simply for continuing conduct (denying full service credit for pregnancy leave) after Congress prohibited that conduct. Conversely, respondents' examples involve imposition of no new duties or disabilities with respect to *already completed* transactions. See, *e.g.*, *Bazemore*, 478 U.S. at 395 ("recovery may not be permitted for pre-1972 acts of discrimination").

Respondents attempt to elide these critical differences by describing AT&T's pre-PDA service credit awards as incomplete acts that merely "marked respondents for future discriminatory treatment" that the PDA could "frustrat[e]" without retroactive effect. Br. 38. But *Evans* forecloses this claim. Once respondents failed to challenge them, AT&T's pre-PDA service credit awards had no continuing legal consequences, and AT&T was

"*entitled*" to rely on them as lawful. 431 U.S. at 558 (emphasis added).

While it is ultimately irrelevant that AT&T could "'undo'" its pre-PDA decisions, Resp. Br. 39, under any "'commonsense, functional'" view, *Fernandez-Vargas*, 548 U.S. at 43, it is clear that, under respondents' reading of the PDA, AT&T cannot escape liability for actions it took prior to the PDA. The only way it could avoid liability would be to grant service credit to respondents and potentially thousands of putative class members, and increase their pension benefits—precisely the relief respondents seek. See Compl., Prayer for Relief ¶¶ 3-6 (seeking recalculation of NCS dates and of retirement benefits based on revised NCS dates). In every practical sense, therefore, AT&T is helpless, under respondents' reading of the PDA, to escape liability (or its functional equivalent) for acts that were (a) completed prior to the PDA and (b) that it was entitled to treat as lawful.

Nor is there any basis to respondents' disingenuous claim that retroactive application of the PDA will have a "predictably modest" impact on AT&T. Br. 43. They suggest that the class in this case is likely to be small, *id.* at 42 & n.17, but they have alleged that it "would be in excess of 15,000" women. Compl. ¶ 15. Because AT&T's occupational pension plan calculates pensions based on months of service, the amount at stake from a "few weeks or months" of service would be significant. Indeed, it is a matter of public record that a comparable suit was settled for nearly $50 million.[10] Imposition of liability based on decisions that AT&T was entitled to treat as lawful would

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[10] *See Verizon Bias Suit Deal Sets Record; Pregnancy Case Yields Payout Of $48.9 Million*, Wash. Post, June 6, 2006, at D1.

plainly upset AT&T's settled expectations, regardless of how many other companies face liability under respondents' reading of the law.[11]

B. The PDA Does Not Impose Liability For AT&T's Post-Enactment Benefit Awards.

Nothing in the PDA provides the necessary clear evidence that Congress intended such retroactivity. To the contrary, its language forecloses such a reading.[12]

The PDA's first sentence overturns *Gilbert* by providing that "[t]he terms 'because of sex' or 'on the basis of sex' include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions." 42 U.S.C. § 2000e(k). The second clause "explains the application of the general principle [embodied in the first clause]," *Newport News*, 462 U.S. at 678 n.14, by providing that "women affected by pregnancy" must be treated for all employment purposes "as other persons not so affected but similar in their ability or inability to work." 42 U.S.C. § 2000e(k).

The language of the second clause refutes respondents' reading. It identifies women who are *both* "affected by pregnancy" *and* "similar in their ability or inability to work" as persons not so affected. This parallelism makes clear that the phrase

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[11] The *amicus* filings by the ERISA Industry Committee and Equal Employment Advisory Council belie respondents' further, equally unsupported, speculation that few companies would be affected by affirmance of the decision below.

[12] AT&T is not estopped from contesting respondents' interpretation of the PDA. Resp. Br. 48. AT&T argued that the PDA's "language clearly indicates that it applies only prospectively," and it attacked the lower court's contrary reading. Ptr. Br. 19-21 & n.6.

"affected by pregnancy" is temporally limited to the period of actual disability, when a comparison of a woman's ability or inability to work can be made.[13] By contrast, it is nonsensical to say that, at the time they *retired*, respondents were "affected by pregnancy" and treated differently than "other persons not so affected but similar in their ability or inability to work." Indeed, an ability or inability to work is irrelevant in the case of retirees. At a minimum, this is hardly the kind of "explicit language" necessary to show that Congress intended to render illegal any post-enactment effects that can be traced to pre-enactment pregnancy-based distinctions.

Moreover, as AT&T demonstrated, the PDA's delayed effective date for benefits programs plainly reveals Congress's intent to apply the PDA only *prospectively* to such programs. Ptr. Br. 19-20. Respondents claim that Congress thought Title VII already barred seniority denials for pregnancy leaves, and thus did not expect the delay to apply to seniority-based benefits. Br. 50. But, as AT&T has shown, that understanding was mistaken: Title VII did not bar such denials before the PDA, and even if such denials could have been challenged on disparate impact grounds, those actions became lawful under *Evans* if not timely challenged. See *supra*, § I.B.-C. Thus, Congress's alleged mistaken understanding confirms that it failed to give the PDA retroactive effect for seniority-based benefits programs (because

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[13] The statute's reference to "receipt of benefits" does not suggest otherwise: it requires that a woman affected by pregnancy receive, during her period of pregnancy-related disability, the same benefits (*e.g.*, disability pay) received by others "not so affected but similar in their ability or inability to work."

it viewed such a step as unnecessary) and instead prescribed prospective effect for *all* benefits programs.

IV. THE DECISION BELOW IS INCONSISTENT WITH § 703(h) OF TITLE VII.

Section 703(h) of Title VII confirms that AT&T cannot be held liable simply because the NCS system gives present effect to pre-PDA NCS date adjustments. Under this provision, it is not unlawful for a bona fide seniority system "to perpetuate the effects of pre-Act discrimination." *International Bhd. of Teamsters* v. *United States*, 431 U.S. 324, 352-53 (1977). Respondents contend that § 703(h) is inapplicable because the NCS system is not bona fide. Br. 51-52. But as AT&T has shown, *supra*, § I, the NCS system is facially neutral, and respondents disavow any claim, Br. 18 n.5, 29, that it had its "genesis in [gender] discrimination." *Teamsters*, 431 U.S. at 356.

The Ninth Circuit held that § 703(h) does not apply to pregnancy discrimination at all. Respondents only half-heartedly defend this reading, claiming § 703(h) is a dead letter only in pregnancy discrimination claims concerning fringe benefits. Both interpretations are wrong. Nothing in the language or history of the PDA supports the extraordinary and anomalous conclusion that Congress permitted bona fide seniority systems to perpetuate the effects of pre-Act discrimination against black and female workers generally, but not pre-Act discrimination on the basis of pregnancy.

The PDA provides that "women affected by pregnancy . . . shall be treated the same for all employment-related purposes . . . and *nothing in section 2000e-2(h) [§ 703(h)] of this title shall be*

interpreted to permit otherwise." 42 U.S.C. § 2000e(k) (emphasis added). As the en banc dissenters and the United States have explained, the underscored text refers only to the last sentence of § 703(h), the so-called Bennett Amendment, which this Court had construed to permit pregnancy discrimination. See *Gilbert*, 429 U.S. at 144-45; see also *California Fed. Sav. & Loan Ass'n* v. *Guerra*, 479 U.S. 272, 285 (1987) (noting that "the [PDA's] second clause was intended to overrule the holding in *Gilbert*"); Ptr. Br. 51-52.

The language of the PDA refutes the Ninth Circuit's far more expansive, and unsupportable, reading. By providing that "women affected by pregnancy . . . shall be treated *the same for all employment-related purposes* . . . as other persons not so affected but similar in their ability or inability to work," 42 U.S.C. § 2000e(k) (emphasis added), the PDA merely places pregnancy on the same footing as other types of protected status. Treating "women affected by pregnancy" the *same* as all other workers means that a bona fide seniority system can perpetuate the effects of pre-Act discrimination against pregnant women just as it can perpetuate the effects of pre-Act discrimination against blacks and non-pregnant women. The PDA's clear mandate of equal treatment is not a mandate for superior protection for pregnant workers. And for this same reason, the PDA cannot be read to suspend § 703(h) only in "fringe benefit discrimination" cases like this one. Resp. Br. 52 n.22. The PDA mandates equal treatment of "women affected by pregnancy" for "*all* employment-related purposes, *including* receipt of benefits under fringe benefit programs." 42 U.S.C. § 2000e(k) (emphases added).

Furthermore, the PDA's legislative history clearly refutes respondents' reading.[14] Indeed, respondents concede that this history confirms that the PDA's proviso "reflects . . . Congress['s] . . . concern[ ] that courts not read the language in Section 703(h), arising from the Bennett Amendment, as an excuse for allowing pregnancy discrimination." Br. 53; see also Ptr. Br. 52-53. Yet they assert that Congress "plainly responded" to this limited concern regarding the Bennett Amendment and the Equal Pay Act by rendering "the entirety of Section 703(h)—not simply its last sentence—inapplicable." Br. 53. This non-sequitur only underscores the error in respondents' position.

Because § 703(h) is fully applicable to this case, it provides an independent mandate for reversal of the decision below.

V. NO DEFERENCE IS OWED TO THE VIEWS OF THE EEOC.

Finally, no deference is owed to the views of the EEOC. The agency's views have not been consistent. Its interpretation gives the PDA improper retroactive

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[14] Respondents dismiss the legislative history because the text of the statute is clear. But, as AT&T has just shown, the PDA's plain language undermines any broad suspension of § 703(h), and respondents themselves posit a "textual conflict" between § 703(h) and the PDA. Br. 52. Respondents' interpretive canon provides no basis for ignoring legislative history, *Richlin Sec. Serv. Co.* v. *Chertoff*, 128 S.Ct. 2007, 2019 (2008) (this Court "ha[s] never held that [an interpretive canon] displaces the other traditional tools of statutory construction," including legislative history), and that canon has no force where, as here, the proposed interpretation would impliedly repeal an earlier enactment. *See Morton* v. *Mancari*, 417 U.S. 535, 549 (1974) (noting "'cardinal rule'" that "'repeals by implication are not favored'").

effect. And that interpretation simply reflects the agency's preference for the Ninth Circuit's decision in *Pallas*, which deemed *Bazemore* controlling, rather than the Seventh Circuit's decision in *Ameritech Benefit Plan Committee* v. *Communication Workers of America*, 220 F.3d 814 (7th Cir. 2000), which deemed *Evans* the controlling authority, *id.* at 822-23.

Contrary to respondents' claim, the EEOC's views are not "long-held and consistent." Br. 54. Prior to the PDA, the agency stated that denials of seniority to women on pregnancy leave violated Title VII. See *id.* (quoting regulations). Its Compliance Manual now states the opposite. It provides a hypothetical comparable to the facts of this case and states that "the denial of service credit to women on maternity leave was *not unlawful* when [the charging party] took her leave in [1975]." *EEOC Compliance Manual*, ch. 3, Employee Benefits, Title VII/EPA Issues, III.B. (Oct. 3, 2000) (emphasis added).

Respondents try to brush this aside as a "passing" "assum[ption]." Br. 56 n.24. But the statement is unqualified, and the EEOC repeated it in its brief below. See JA 146. Indeed, citing *Evans*, it described pre-PDA service credit denials as "equivalent to a similar decision made after the PDA was in effect but which was not timely challenged." *Id.* at 137 n.1. This is a clear recognition that such pre-PDA acts were legal.

Thus, in stating that the PDA is violated by post-enactment reliance on a lawful pre-PDA service credit denial, the EEOC construes the PDA as applying retroactively. No deference is owed to such an interpretation. As AT&T has shown, there is no affirmative evidence that Congress intended the PDA to apply retroactively, and the Compliance Manual does not purport to identify any. Nor does it even

mention § 703(h), much less explain how its finding of a post-enactment PDA violation based on a lawful pre-PDA denial of service credit can be reconciled with § 703(h), which provides that it is not unlawful for a bona fide seniority system "to perpetuate the effects of pre-Act discrimination." *Teamsters*, 431 U.S. at 352-53.

In fact, the *only* support the EEOC identifies are the decisions in *Pallas* and two district court cases. *EEOC Compliance Manual*, ch. 3, Employee Benefits, Title VII/EPA Issues, III.B. n.96. That same footnote, see *id.*, notes the Seventh Circuit's contrary decision in *Ameritech*. Obviously, no deference is owed to an agency judgment that simply rests on lower court decisions, particularly where those decisions conflict, and this Court has granted *certiorari* to resolve that very conflict. See *Ledbetter*, 127 S.Ct. at 2177 n.11.

CONCLUSION

For the foregoing reasons and those set forth in petitioner's opening brief, the judgment below should be reversed.

Respectfully submitted,

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December 2, 2008